

Message Text

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ORIGIN OPIC-06

INFO OCT-01 NEA-10 ISO-00 EB-08 /025 R

DRAFTED BY OPIC/GC AKEESEE
APPROVED BY EB/IFD/ OIA:MPBOERNER
EB/IFD/OIA;D GRANT
NEA/PAB: MHORNBLOW
-----080298 270016Z /66

O 262207Z AUG 77
FM SECSTATE WASHDC
TO AMEMBASSY KABUL IMMEDIATE

C O N F I D E N T I A L STATE 204918

E.O. 11652: N/A

TAGS: EVIN

SUBJECT: FISCHBACH KAJAKI POWER PLANT CLAIM

REF: (A) KABUL 5415; (B) STATE 118663; (C) KABUL 1850;
(D) KABUL 5171; (E) KABUL 5236.

1. RE REF (A) PARA 2, ASSUMPTION CORRECT. CONTRACT 8283
(KAJAKPOWER PLANT) EXTENDED TO SEPTEMBER 13, 1977, AND
CONTRACT 8719 (KAJAKAI TRANSMISSION LINE) EXTENDED THROUGH
DECEMBER 1977.

2. BILL FRASER OF AID INFORMED OPIC 8/22 THAT WPA CHIEF
HAS QUOTE RECEIVED MINISTERIAL AUTHORIZATION UNQUOTE FOR
PAYMENT OF APPROXIMATELY \$540,000 ON QUOTE UNDISPUTED UN-
QUOTE PORTION OF FOI POWER PLANT CLAIM, AND IS PREPARING
LETTER TO AID REQUESTING ALLOCATION OF THAT AMOUNT. FOI
WASHINGTON COUNSEL ADVISED OPIC 8/22 THAT FOI WILL ACCEPT
THIS SETTLEMENT OF UNIT COST CLAIM.

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3. THE REMAINING UNRESOLVED PORTION OF CLAIM, I.E., THAT
CONCERNING EXTENDED OVERHEAD, MUST BE RESOLVED QUICKLY BE-
CAUSE OF TWO IMMINENT DEADLINES. FIRST, IF BY SEPTEMBER 30
GOA HAS NEITHER (A) SUBMITTED REQUEST FOR BALANCE OF FUNDS
AND SPECIFIED HOW IT INTENDS TO SETTLE FOI OVERHEAD CLAIM
OR (B) AGREED TO SUBMIT CLAIM TO ARBITRATION AS REQUIRED BY

FOI/GOA CONTRACT, THEN AID FUNDING OBLIGATION WILL EXPIRE AND ANY PAYMENT WILL HAVE TO COME WHOLLY OUT OF GOA'S POCKET. SECOND, IF BY SEPTEMBER 9 GOA HAS NEITHER AGREED TO SETTLE OVERHEAD CLAIM NOR AGREED TO SUBMIT IT TO ARBITRATION, FOI WILL PRESENT CLAIM TO OPIC UNDER CONTRACT 8283 ON GROUNDS THAT GOA HAS FAILED FOR SIX MONTHS AFTER FOI HAD DESIGNATED ITS ARBITRATOR TO TAKE ANY STEPS TO SUBMIT DISPUTE TO ARBITRATION. AS STATED REF (B), IF OPIC ACCEPTS THIS FOI CLAIM, IT WILL BE LIABLE FOR FIFTY PERCENT OF AMOUNT ORIGINALLY CLAIMED BY FOI IN RESPECT OF EXTENDED OVERHEAD. THIS LIABILITY COULD EXCEED \$500,000.

4. UPON PAYMENT TO FOI, OPIC IS SUBROGATED TO FOI'S CLAIM AGAINST GOA. THE AGREEMENT (HEREINAFTER, THE QUOTE BILATERAL UNQUOTE) BETWEEN THE UNITED STATES OF AMERICA AND AFGHANISTAN EFFECTED BY EXCHANGE OF NOTES SIGNED AT KABUL JUNE 5 AND 9, 1957, ENTITLED QUOTE GUARANTY OF PRIVATE INVESTMENT UNQUOTE, PROVIDES AT PARAGRAPH 4 QUOTE THAT ANY CLAIM AGAINST THE GOA TO WHICH THE USG MAY BE SUBROGATED AS A RESULT OF ANY PAYMENT UNDER (AN INVESTMENT) GUARANTY SHALL BE THE SUBJECT OF DIRECT NEGOTIATIONS BETWEEN THE TWO GOVERNMENTS. IF WITHIN A REASONABLE PERIOD THEY ARE UNABLE TO SETTLE THE CLAIM BY AGREEMENT, IT SHALL BE REFERRED FOR FINAL AND BINDING DETERMINATION TO (ARBITRATION) UNQUOTE.

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5. ADDITIONALLY, SECTION 620(C) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED, COULD THEORETICALLY BECOME APPLICABLE SINCE THAT SECTION BARS THE PROVISION OF FOREIGN AID TO QUOTE ANY COUNTRY WHICH IS INDEBTED TO ANY U.S. CITIZEN OR PERSON FOR GOODS OR SERVICES FURNISHED OR ORDERED WHERE (L) SUCH CITIZEN OR PERSON HAS EXHAUSTED AVAILABLE LEGAL REMEDIES, WHICH SHALL INCLUDE ARBITRATION... UNQUOTE.

6. AS POST NOTED IN PARA 3, REF (C), MWP HAS PROCEEDED VERY SLOWLY ON RESOLUTION OF OVERHEAD CLAIM. OPIC NOTED THAT MWP PAID UNIT COST OVERRUNS ON TRANSMISSION LINE PROJECT WITHOUT UNDUE DELAY AND IS NOW APPARENTLY READY TO SETTLE UNIT COST PORTION OF POWER PLANT CLAIM. ON THEORY GOA MAY GENUINELY DOUBT PROPRIETY AND VALIDITY OF EXTENDED OVERHEAD TYPE REPEAT TYPE OF CLAIM, TWO OPIC REPS ACCOMPANIED BY MANNING SELZER, GENERAL COUNSEL OF U.S. ARMY CORPS OF ENGINEERS MET AUG 23 WITH GHULAM FAROUK TURABAZ, MINISTER COUNSELLOR-OF AFGHAN EMB IN WASHINGTON.

7. SELZER AND OPIC REPS INTENTION WAS TO IMPRESS ON EMBASSY NEED FOR GOA TO ADHERE TO CONTRACT TERMS AND AT LEAST SUBMIT OVERHEAD MATTER TO ARBITRATION LEST OPIC BE

REQUIRED, UPON PAYMENT OF FOI'S CLAIM UNDER CONTRACT 8283,

TO INVOKE BILATERAL VERSUS GOA. FIVE AREAS WERE DISCUSSED WITH TURABAZ: (1) BRIEF BACKGROUND OF CLAIM; (2) LEGITIMACY OF EXTENDED OVERHEAD AS A TYPE OF CLAIM; (3) CONTRACTUAL DUTY OF GOA TO ARBITRATE; (4) OPIC'S CONTRACTUAL DUTY TO PAY FOI; AND (5) OPIC'S LEGISLATIVELY MANDATED, I.E., STATUTORY DUTY TO PURSUE CLAIM WITH GOA AS PROVIDED IN BILATERAL ONCE FOI HAD BEEN PAID. OPIC REPS RIGOROUSLY AVOIDED ANY ARGUMENT ON MERITS OF AMOUNT REPEAT AMOUNT OF FOI CLAIM.

8. UNCLEAR HOW MUCH OF PRESENTATION REGISTERED WITH TURABAZ. OPIC REPS MADE LOW KEY REQUEST THAT IF HE AND CONFIDENTIAL

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AMBASSADOR AGREED WITH OPIC POINTS THEY RECOMMEND TO GOA AND MWP SIMPLY THAT MWP AT LEAST SUBMIT TO ARBITRATION WITHOUT FURTHER DELAY. TURABAZ DID AGREE TO PASS ON TO MWP THE POINTS OPIC MADE WITH IMPLICATION THAT EMBASSY FELT ACTION ON THE MATTER SHOULD BE TAKEN BY MWP.

9. IN VIEW OF PROXIMITY OF SEPT 9 DEADLINE, POSSIBLE TENDENCY OF MWP TO SIT ON ITS HAUNCHES AND TAKE A BREATHER AFTER SETTLING UNIT COST ASPECT OF POWER PLANT CLAIM, AND UNDESIRABLE EFFECT OF OPIC'S INHERITING FOI CLAIM, OPIC REQUESTS AMBASSADOR'S FURTHER ASSISTANCE IN INDUCING MWP BY SEPT 9 TO EITHER SETTLE OVERHEAD CLAIM OR SUBMIT IT TO ARBITRATION.

10. OPIC SUGGESTS MOST SIGNIFICANT TALKING POINT MAY BE THE SMALL PROBABLE COST OF SETTLEMENT TO GOA. FRAZER STATES \$1,100,000 LEFT IN AID KAJAKI FUND, \$200,000 OF WHICH earmarked for payment of engineering contract claim. IF \$540,000 PAID FOR UNDISPUTED, I.E., UNIT COST OVERRUN, CLAIM BALANCE AVAILABLE FROM AID FOR PAYMENT OF FOI'S EXTENDED OVERHEAD CLAIM WILL BE \$360,000. FRAZER ALSO ESTIMATES THAT BECAUSE OF HIGHLY CONCESSIONAL TERMS OF LOAN, IT IS EQUIVALENT TO AN OUTRIGHT GRANT OF 65 PERCENT OF LOAN AND TO A LOAN ON COMMERCIAL TERMS FOR THE REMAINING 35 PERCENT. FOI COUNSEL ADVISES THAT CURRENT FOI OVERHEAD CLAIM IS \$460,000 AND 11 MILLION AFGHANIS (APPROX \$250,000) VERSUS GOA'S OFFER OF \$211,000 AND 6 MILLION AFGHANIS (APPROX \$136,000). THE ENTIRE AMOUNT OF THE TOTAL GOA BID (\$347,000) IS COVERED BY THE BALANCE IN THE AID KITTY (\$360,000) WHICH, BY FRAZER'S CALCULATIONS, MEANS THAT 65 PERCENT OF THE GOA OFFER IS BEING FUNDED BY A VIRTUAL GRANT. CONSEQUENTLY, IT COULD BE ARGUED THAT IN THE OVERHEAD SETTLEMENT GOA IN ESSENCE WILL BE PAYING 35 PERCENT OF THE
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FIRST \$360,000 OR \$126,000, PLUS 100 PERCENT OF ANY ADDITIONAL SETTLEMENT AMOUNT.

11. THE FOI CLAIM - GOA OFFER GAP IS \$363,000. ASSUMING GOA OFFERED AN ADDITIONAL \$125,000, GOA'S TRUE SETTLEMENT COST WOULD BY THIS REASONING BE ONLY \$126,000 PLUS \$125,000 OR \$251,000. IF, ON THE OTHER HAND, GOA NEITHER SETTLES NOR ARBITRATES BY SEPT 9, OPIC WILL HAVE A CLAIM AGAINST GOA FOR APPROXIMATELY \$500,000, I.E., THE AMOUNT OPIC MAY HAVE TO PAY FOI, AND AFTER SEPT 30 NO PART OF THAT AMOUNT WILL BE AVAILABLE FROM AID FUNDS. ECONOMIC LOGIC THEREFORE SUGGESTS THAT GOA SHOULD EITHER SETTLE OR ARBITRATE BY SEPT 9.

12. USE OF GOA COUNTEROFFER FIGURE OF \$125,000 IN PARA 11 IS PURELY CONJECTURAL ON OPIC'S PART AND NOT MEANT TO IMPLY FOI ACCEPTANCE OF THAT AMOUNT. ALSO STATEMENTS THAT AS OF SEPT 9, OPIC WILL HAVE TO PAY FOI ARE BASED ON A QUOTE WORST CASE UNQUOTE SCENARIO. IN FACT THERE ARE A NUMBER OF DEFECTS IN FOI'S CLAIM AGAINST OPIC WHICH RENDER ITS VALIDITY QUESTIONABLE. NEVERTHELESS, OPIC IS OPERATING ON ASSUMPTION FOI WILL INDEED PRESENT CLAIM SHORTLY AFTER SEPT 9.

13. OPIC URGENTLY REQUESTS POST'S ADVICE AS TO WHETHER AMBASSADOR CAN MAKE FOREGOING POINTS, AND OTHERS HE DEEMS GERMANE, TO FORNMIN OR MWP, AS HE DEEMS APPROPRIATE. OPIC PREPARED TO FORWARD ALL DATA AND SUPPORTING MATERIAL AND/OR PERSONNEL AMBASSADOR MAY REQUEST.

14. OPIC WOULD ALSO APPRECIATE POST'S CANDID EVALUATION (A) OF ADEQUACY (E.G., BEYOND WRITING LETTERS TO MWP) OF FOI'S EFFORTS TO BRING MWP INTO MEANINGFUL, GOOD FAITH NEGOTIATIONS, INCLUDING FOI EFFORTS, IF ANY, TO EDUCATE MWP ON VALIDITY AND LEGITIMACY OF OVERHEAD AS A TYPE REPEAT TYPE OF CLAIM; AND (B) OF SUITABILITY OF GIVENS AS NEGOTI-
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ATOR. OPIC CONCERNED THAT CLAIM SETTLEMENT DELAY IN PART CAUSED BY INSUFFICIENT FOI EFFORTS, OTHER THAN LETTERS, TO BRING GOA REPS TO THE TABLE AND BY FACT THAT GIVENS, WHILE DOUBTLESS COMPETENT CONSTRUCTION OPERATIONS MANAGER, IS NOT TRAINED NEGOTIATOR.

15. OPIC ALSO REQUESTS IT BE PUT ON MAILING LIST FOR ALL

CABLES RE KAJAKAI. FOR EXAMPLE, OPIC HAS NEVER SEEN
REF (D) AND WAS NOT ON DISTRIBUTION FOR REF (E) WHICH IT
HAD TO GET FROM FRASER.

16. OPIC APPRECIATES POST'S CONTINUING COOPERATION THIS
MATTER AND WELCOMES POST COMMENTS AND RECOMMENDATIONS RE
RESOLUTION OF PROBLEM. CHRISTOPHER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: CLAIMS, DEBT REPAYMENTS, ELECTRIC POWER PLANTS
Control Number: n/a
Copy: SINGLE
Sent Date: 26-Aug-1977 12:00:00 am
Decaption Date: 01-Jan-1960 12:00:00 am
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
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Document Source: CORE
Document Unique ID: 00
Drafter: GC AKEESEE
Enclosure: DG ALTERED
Executive Order: GS
Errors: N/A
Expiration:
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Format: TEL
From: STATE
Handling Restrictions: n/a
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Legacy Key: link1977/newtext/t19770817/aaaaanwv.tel
Line Count: 231
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Litigation Codes:
Litigation History:
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Review Withdrawn Fields: n/a
SAS ID: 1464396
Secure: OPEN
Status: NATIVE
Subject: FISCHBACH KAJAKI POWER PLANT CLAIM
TAGS: EFIN, ECRE, ENRG
To: KABUL
Type: TE
vdkgvwkey: odbc://SAS/SAS.dbo.SAS_Docs/8bf0df51-c288-dd11-92da-001cc4696bcc
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